TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 178.

WESTERN ELECTRICAL SUPPLY COMPANY, PLAINTIFF IN ERROR,

vs.

ABBEVILLE ELECTRIC LIGHT AND POWER COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED JANUARY 20, 1904.

(19,209.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 21, 1904.

1 UNITED STATES OF AMERICA:

Supreme Court of South Carolina.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said supreme court, in the city of Columbia, this 16th day of January 1904

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of the Supreme Court of S. C.

2 SOUTH CAROLINA:

I, U. R. Brooks, clerk of the supreme court of South Carolina, do hereby certify that an approved bond for five hundred dollars from the Western Electrical Supply Co. to Abbeville Electric Light & Power Company has been filed in this office in accordance with the order of Hon. Y. J. Pope, chief justice of the supreme court of South Carolina.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS,
Clerk of the Supreme Court of S. C.

3 Know all men by these presents, that we, The Western Electrical Supply Co. as principal, and American Bonding Company of Baltimore, as sureties, are held and firmly bound unto the Abbeville Electric Light and Power Co. in the full and just sum of five hundred dollars, to be paid to the said Abbeville Electric Light and Power Co., its certain attorney, successors, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this — day of ——, in the year of our Lord one thousand nine hundred and —.

Whereas, lately at a sitting of the supreme court of South Carolina in a suit depending in said court, between the Abbeville Electric Light and Power and the Western Electrical Supply Company a judgment was rendered against the said Western Electrical Supply Company and the said Western Electrical Supply Company having obtained from the chief justice of the supreme court of S. C. an allowance of a writ of error to the Supreme Court of the United States upon the filing of a bond in the sum of five hundred dollars. Now that the writ of error to reverse said judgment may issue in accordance with the order of the chief justice and that a citation

may issue citing and admonishing Abbeville Electric Light & Power Co. to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date of the said writ of error.

Now, the condition of the above obligation is such, that if the said Western Electrical Supply Company shall prosecute the writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void;
4 else to remain in full force and virtue.

WESTERN ELECTRICAL SUPPLY CO.
H. B. GILLMAN, *Pres. & Treas.*
AMERICAN BONDING COMPANY OF BALTIMORE,
By W. P. GREENE, *Att'y in Fact.*

Sealed and delivered in presence of—
FRANK B. GARY.
W. B. MARTIN.

Approved by—
Y. J. POPE,
Chief Justice of Supreme Court of the State of South Carolina.

Attest:

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

5 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Abbeville Electric Light and Power Co., Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of South Carolina wherein Western Electrical Supply Co. is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Y. J. Pope, chief justice of the supreme court of South Carolina, this seventh day of January, in the year of our Lord one thousand nine hundred and four.

[Seal Supreme Court of South Carolina.]

Y. J. POPE,
Chief Justice of the Supreme Court of South Carolina.

Attest: U. R. BROOKS,
[L. S.] *Clerk of Supreme Court of South Carolina.*

6 [Endorsed:] United States of America South Carolina Abbeville Electric Light & Power Co. plaintiff against Western Electrical Supply Co. defendant Citation Frank B. Gary def't's att'y

On this 13th day of January, in the year of our Lord one thousand nine hundred and four, personally appeared W. B. Martin before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Ward Thompson, manager of Abbeville Electric Light & Power Co., and that he also left a true copy in the office of Wm. N. Graydon, att'y for Abbeville Electric Light & Power Co. at 5.10 o'clock on the 13th Jan. 1904, no one being at that time in the office. W. B. MARTIN.

Sworn to and subscribed the 13th day of January, A. D. 1904.
J. L. PERRIN, *C. C. C. P.*

7 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the supreme court of the State of South Carolina:

Because, in the records and proceedings, as also the rendition of a judgment in a plea which is in the said supreme court of South Carolina, between The Abbeville Electric Light and Power Company, plaintiff, *versus* The Western Electrical Supply Company, defendant, a manifest error has happened, to the great damage of the said defendant Western Electrical Supply Company as by the complaint appears. We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, D. C., and filed in the office of clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 7th day of January 1904.

Done in the city of Charleston, with the seal of the circuit court of the United States for the district of South Carolina attached.

[Seal U. S. Circuit Court, District of South Carolina.]

C. J. MURPHY,
Clerk of the Circuit Court of the U. S. for the District of S. C.

Allowed
Y. J. POPE.
Chief Justice of the Supreme Court of the State of South Carolina.

8 [Endorsed:] United States of America South Carolina. Abbeville Electric Light & Power Company plaintiff-respond't against Western Electrical Supply Co., def't-app'l't. Writ of error. Frank B. Gary att'y for Western Electrical Supply Co.

9 THE STATE OF SOUTH CAROLINA:

Supreme Court.

ABBEVILLE ELECTRIC LIGHT AND POWER Co., Plaintiff, *against* WESTERN ELECTRICAL SUPPLY CO., Defendant. } Assignment of Errors.

Now comes the above defendant and files herewith its petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment:

The supreme court of South Carolina erred in holding and deciding that sub-division I of section 155 of the Code of Civil Procedure of South Carolina, providing for service of summons upon a foreign corporation, and, the act of the General Assembly of South Carolina, amending the said section of the Code of Civil Procedure by striking out the word "resident" approved the 2nd. day of March, 1839, and also the act of the General Assembly of South Carolina, entitled "An act to further prescribe the terms and conditions upon which foreign corporations may do business, approved the 2nd. day of March 1897, were valid.

The validity of said section of the Code of Procedure and acts of the General Assembly was denied and drawn in question by the defendant on the ground of their being repugnant to the Constitution of the United States, and in contravention thereof.

The said errors are more particularly set forth as follows:

10 The supreme court *court* of South Carolina erred in holding and deciding—

First. That the said acts and section of the Civil Code are not repugnant to or in contravention of the fifth and fourteenth amendments to the Constitution of the United States, wherein it is provided that no person shall be deprived of life, liberty or property, without due process of law; and wherein it is provided that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. And that said section of the Code of Civil Procedure and the said acts of the General Assembly did not abridge

the privileges and immunities of citizens or of this defendant as guaranteed by said fourteenth amendment; and that the said section of the Code of Civil Procedure and the said acts did not deprive citizens or this defendant of its property without due process of law contrary to the provisions of said fifth and fourteenth amendments of the Federal Constitution. For which errors the defendant Western Electrical Supply Co. prays that the judgment of the said supreme court of South Carolina herein be reversed, and a judgment entered for the defendant Western Electrical Supply Co., and for costs.

WESTERN ELECTRICAL SUPPLY CO.,
By FRANK B. GARY, *Its Attorney.*

11 THE STATE OF SOUTH CAROLINA:

Supreme Court.

ABBEVILLE ELECTRIC LIGHT AND Power Company, Plaintiff,
against
WESTERN ELECTRICAL SUPPLY COMpany, Defendant.
} Petition for Writ of Error.

Considering itself aggrieved by the final decision of the supreme court in rendering judgment against it in the above entitled case, the defendant herein prays a writ of error from the said decision and judgment to the Supreme Court of the United States. Assignment of errors herewith.

WESTERN ELECTRICAL SUPPLY CO.,
By FRANK B. GARY, *Its Attorney.*

STATE OF SOUTH CAROLINA, *Supreme Court,* } ss:

Let the writ of error issue upon the execution of a bond by Western Electrical Supply Company to the Abbeville *Abbeville* Electric Light and Power Company in the sum of five hundred dollars.

Y. J. POPE,
Chief Justice of the Supreme Court of the State of South Carolina.

Attest:

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

12 [Endorsed:] United States of America South Carolina Abbeville Electric Light & Power Co., pl'ff resp'd't against Western Electrical Supply Co., def't app'l't. Assignments of error and order Frank B. Gary att'y for Western Electrical Supply Co.

13 THE STATE OF SOUTH CAROLINA,
County of Abbeville.

In the Supreme Court, Eighth Circuit, November Term, 1901.

ABBEVILLE ELECTRIC LIGHT & POWER CO., *Plaintiff-Respondent,*
against
WESTERN ELECTRICAL SUPPLY CO., Defendant-Appellant.

Statement of Case.

The above stated case was commenced by the service of the summons and complaint herein upon one George F. Schminke, at Abbeville Court-house, South Carolina, on the 7th day of November, 1900, under the claim of the plaintiff, that the said Schminke was an agent of the defendant.

The summons in the usual form, directed to the defendant, and required that the defendant serve its answer upon plaintiff's attorney within twenty days after the service of the summons and complaint upon the defendant.

The complaint is as follows:

(Title of Cause.)

The plaintiff above named, by its attorney, Wm. N. Graydon, complaining of the above named defendant, alleges:

I. That the plaintiff is a corporation duly chartered under the laws of the State of South Carolina.

II. That the defendant is a corporation duly chartered under the laws of the State of Missouri, but that the cause of action set forth herein arose in this State.

III. That on or about the — day of December, 1899, the defendant sold to the plaintiff an electrical machine for the purpose of generating electricity, known as a 45 K. W. Warren alternator, under a guarantee from the defendant that said machine was
14 free from any and all inherent electrical or mechanical defects.

IV. That the plaintiff commenced operating said machine on the 25th day of February, 1900, the main purpose of the plaintiff, which was known to the defendant, being to furnish electric lights for the city of Abbeville, South Carolina, to which the plaintiff had agreed to furnish forty-two arc lights, of two thousand candle power each.

V. That the said machine failed to come up to the guarantee of the defendant, and has not been able at any time to run more than thirty-three arc lights of two thousand candle power each, and is totally insufficient for the purpose for which it was bought, and is inherently defective.

VI. That in order for plaintiff to carry out his contract with

the city of Abbeville, it will be necessary for plaintiff to put in a new alternator, which will cost at least nine hundred and ninety-five dollars.

VII. That in addition to the cost of the machine the plaintiff has lost four hundred dollars, deducted by the city of Abbeville for failure to furnish lights, which failure was caused by reason of the fact that the alternator failed to come up to the guarantee of the defendant.

That in addition to the above the plaintiff has been damaged in actual business lost during the time that they have been operating said machine to the amount of six hundred dollars additional, making the total loss and damage of the plaintiff the sum of nineteen hundred and ninety-five dollars.

VII. That the defendant has promised time and again to remedy the defect in said machine or to furnish a new one, but they have failed to do so, and by reason of the failure of the defendant to furnish a new machine of the class they promised, the plaintiff has been damaged in the sum of nineteen hundred and ninety-five dollars.

Wherefore the plaintiff demands judgment against the defendant for the sum of nineteen hundred and ninety-five dollars, and the costs and disbursement of this action.

Within the time within which the supreme court permitted the defendant to answer the complaint, the defendant served upon the plaintiff's attorney the following notice of special appearance and the following affidavit:

(Title of the Cause.)

To Wm. N. Graydon, Esq., plaintiff's attorney:

Please take notice, that the defendant herein declines to answer the complaint herein, in accordance with the allowance of the supreme court, as it is advised that by answering it would submit itself to the jurisdiction of this court.

Nevertheless the defendant enters a special appearance for the purpose of objecting to the jurisdiction of this court with the ultimate view of appealing to the Supreme Court of the United States from the final judgment in the case should the same be adverse to the defendant.

Upon the call of the case the defendant will object to the judgment on the ground that the summons has not been served upon the defendant in this State, and this court has not, therefore, acquired jurisdiction of the person or property of the defendant.

The defendant will move the court to set aside the attempted service of the summons on the defendant, on the ground that subdivision 1 of section 155 of the Code, providing for service upon a foreign corporation, and the act of the General Assembly of South Carolina amending the said section of the Code, by striking out the word "resident," approved 2nd March, 1899, are in contravention of

the fifth and fourteenth amendments to the Constitution of the
16 United States, and on the further ground that the act of the General Assembly of South Carolina, entitled "An act to further prescribe the terms and conditions upon which foreign corporations may do business within this State," approved the 2nd day of March, A. D. 1897, is in contravention of the fifth and fourteenth amendments to the Constitution of the United States.

The affidavits upon which this motion will be made will be duly served upon you hereafter.

The defendant will appear for the foregoing purposes, and for no other.

FRANK B. GARY,
Defendant's Attorney.

September 10, 1900.

In due time the following notice and affidavits were served upon the plaintiff's attorney.

(Title of the Cause.)

To Wm. N. Graydon, Esq., plaintiff's attorney:

Please take notice, that the motion of which you were heretofore given notice will be made upon the accompanying affidavits and the papers in the case.

FRANK B. GARY,
Defendant's Attorney.

September 16, 1901.

(*Affidavit.*)

(Title of the Cause.)

Now comes The Western Electrical Supply Co., defendant herein, and states that it is not now, and never has been engaged in business in the State of South Carolina, and that it has not now nor has it ever had an office or place of business in said State. That the contract between plaintiff and defendant, which is pleaded in the plaintiff's petition, was not made in the State of South Carolina. That said contract, by its terms, was to be performed by defendant in the town of Sandusky, State of Ohio, and that said contract
17 was actually and fully performed by defendant in said town of Sandusky, State of Ohio, by delivering certain merchandise in said town and State of Ohio to the plaintiff. That George F. Schminke, the person upon whom service of summons was had herein, was not at the time of said service and never has been an officer of this defendant nor a director thereof, but had been employed by defendant for a short time as a traveling salesman. That his duties and power were simply and solely to take orders for the

sale of merchandise subject to the approval of this defendant. That he was not employed to make adjustments, and was not sent by defendant in this particular case to make any adjustment or settlement of the controversy between plaintiff and defendant, but while on his route as a saiesman was requested by defendant to go to Abbeville and examine into the running of the machinery in controversy and the complaints of the plaintiff and report the facts to this defendant, and that while said plaintiff was in the town of Abbeville for that purpose, service of summons herein was had on him. Defendant further states that it has a just and meritorious defense to this action.

WESTERN ELECTRICAL SUPPLY CO.
H. K. GILLMAN, *Treasurer.*

STATE OF MISSOURI, }
City of St. Louis. }

H. K. Gillman and R. V. Scudder being severally duly sworn, on their oaths, state that they are and were at the times hereinbefore mentioned, respectively, president and manager of The Western Electrical Supply Company, defendant herein, and that the statements contained in the foregoing are true.

H. K. GILMAN.
R. V. SCUDDER.

18 Subscribed and sworn to before me this 9th day of September, 1901.

GEORGE E. TAYLOR,
[SEAL.] *Notary Public.*

(My commission expires December 28th, 1903.)

Upon the call of the case for trial the defendant, through its attorney, Frank B. Gary, objected to the jurisdiction of the court in pursuance of the notice above set forth, and presented the affidavits above set forth in support of the objection, and set forth its objections in writing as follows:

(Title of the Cause.)

The defendant having entered a special appearance, interposes a demurrer to the jurisdiction of this court on the ground that the defendant has not been brought within the jurisdiction of the court by service of summons upon it in this State, and on the ground that sub-division I of section 155 of the Code of Procedure of S. C., providing for service upon a foreign corporation, and the act of the General Assembly of South Carolina amending the said section of the Code by striking out the word "resident," approved 2nd March, 1899, are in contravention of the fifth and fourteenth amend-

ments to the Constitution of the United States; and on the further ground that the act of the General Assembly of South Carolina, entitled "An act to further prescribe the terms and conditions upon which foreign corporations may do business within this State," approved 2nd day of March, A. D. 1897, is in contravention of the fifth and fourteenth amendments to the Constitution of the United States.

FRANK B. GARY,
Defendant's Attorney.

Oct. 17th, 1901. (Certificate.)

19 The presiding judge, Hon. D. A. Townsend, overruled the objection to the jurisdiction of the court, and made the following order:

(Title of the Cause.)

The defendant Western Electrical Supply Company, through its attorney Frank B. Gary, entered a special appearance for the purpose of objecting to the judgment in this case and demurs to the jurisdiction of this court on the ground that the said defendant is a foreign corporation, has not been served with summons in this State and has not been brought in the jurisdiction of this court, and on the ground that sub-division 1 of section 155 of the Code of Civil Procedure of South Carolina, providing for service upon a foreign corporation, and the act of the General Assembly of the State of South Carolina amending the said section of the Code by striking out the word "resident," approved the 2nd of March, 1899, are in contravention of the fifth and fourteenth amendments to the Constitution of the United States; and on the further ground that the act of the General Assembly of the State of South Carolina, entitled "An act to further prescribe the terms and conditions upon which foreign corporations may do business within this State," approved the 2nd day of March A. D. 1897, is in contravention of the fifth and fourteenth amendments to the Constitution of the United States.

The defendants offered affidavits which are herewith filed. I am constrained to adopt the construction placed upon said statutes by the supreme court of the State, and I hold that the acts and section of the Code referred to in the demurrer are not in contravention of the fifth and fourteenth amendments to the Constitution of the United States.

I hold further that this court has acquired jurisdiction of the person of the defendant.

20 The demurrer to the jurisdiction of this court and the objection to this court rendering judgment are overruled.

D. A. TOWNSEND,
Presiding Judge.

October 7th, 1901.

The defendant thereafter had no further connection with the case.

The plaintiff then offered evidence tending to support the allegations of the complaint, and the jury rendered a verdict for the plaintiff in the sum of $1,995.00, and judgment was duly entered up upon said verdict in accordance with law.

In due time the defendant gave notice of intention to appeal to the supreme court of the State from the order, rulings of his honor, verdict of the jury, and the judgment entered thereon, and in the time prescribed by law served this case and the following exceptions:

1. Because his honor the presiding judge erred in holding that the court of common pleas for Abbeville county had acquired jurisdiction of the person of the defendant, when it appeared that the defendant is a foreign corporation, had not come within the limits of South Carolina to do business, that the contract for the sale of the machinery was not made in South Carolina, by its terms was to be performed in Ohio, and that the only service of process made was upon a person in the State in no representative capacity, with no authority to bind the defendant in any way and only connected with the defendant as a travelling salesman to take orders for the sale of machinery subject to the approval of the defendant.

2. Because his honor the presiding judge erred in not holding that it was beyond the power of the State to enact a law that would authorize service of process upon any agent of a foreign corporation and thus bring such foreign corporation within the jurisdic-
21 tion of the courts of this State, such a law being in contravention of the fifth and fourteenth amendments to the Constitution of the United States, wherein it is provided that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."

3. Because his honor erred in holding that sub-division 1 of section 155 of the Code of Procedure of South Carolina, as amended by the act of the General Assembly of South Carolina, approved the 2nd March, 1899, is not in contravention of the fifth and fourteenth amendments to the Constitution of the United States, in which amendments it is provided that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."

4. Because his honor the presiding judge erred in holding that the act of the General Assembly of South Carolina, entitled "An act to further prescribe the terms and conditions upon which foreign corporation- may do business in this State," approved the 2nd March 1897, is not in contravention of the fifth and fourteenth amendments to the Constitution of the United States. It is respectfully submitted that the said act and especially section 4 thereof, providing that "it shall be a further condition precedent to the right of any such cor-

poration to do business in this State, that it shall be taken and deemed to be the fact, irrebuttable, and part and parcel of all contracts entered into between such corporation and a citizen or corporation of this State, that the taking or receiving from any citizen or corporation of this State of any charge, fee, payment, toll,
22 impost, premium or other money or valuable consideration, under or in performance of any such contract, or of any condition of the same, shall constitute the doing of its corporate business within this State, and that the place of the making and of performance of such contract shall be deemed and held to be within this State, anything contained in such contract or any rules or by-laws of such corporation to the contrary notwithstanding," abridges the privileges or immunities of citizens of the United States, and deprives the citizen of their property without due process of law, and denies the equal protection of the law.

5. Because his honor the presiding judge erred in not holding that the defendant had not come within the limits of the State of South Carolina, and that the summons in this case had not been served upon it in this State.

6. Because the presiding judge erred in not setting aside the service of the summons, and in not dismissing the complaint; and erred in allowing verdict to be rendered and the judgment entered in this case.

FRANK B. GARY,
Defendant's Attorney.

A true copy:

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

23 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, April Term, 1902.

ABBEVILLE ELECTRIC LIGHT & POWER CO., Plaintiff, Respondent,
against
WESTERN ELECTRICAL SUPPLY CO., Defendant, Appellant.

Opinion.

By LE ROY F. YOUMANS, *Acting Associate Justice:*

For a proper understanding of the questions involved in this appeal, a statement somewhat minute of the proceedings is necessary. The action was commenced by service of summons and complaint upon one George F. Schminke, under the claim of plaintiff that Schminke was an agent of defendant, a corporation duly chartered under the laws of the State of Missouri. In the complaint it is alleged that the cause of action set forth arose in the State of South

Carolina, and the other allegations set forth as the cause of action the breach of a contract whereby defendant guaranteed that a certain electric machine for the purpose of generating electricity known as a 45 K. W. Warren alternator sold by defendant to plaintiff in December 1899 was free from any and all inherent electrical or mechanical defects. The complaint alleges also that defendant promised time and again to remedy the defect in said machine or furnish a new one, but failed to do so. Before the time for answering expired the following notice was served on plaintiff's attorney:

24 (Title of Cause.)

To Wm. N. Graydon, Esq., plaintiff's attorney:

Please take notice that the undersigned hereby enters a special appearance for the above named defendant, and upon the call of this case will move the presiding judge to set aside the service of the summons herein on the ground that the party served with the summons and complaint herein on the seventh day of November 1900 was not an agent of the defendant.

Defendant will appear for the purpose of objecting to the jurisdiction of this court, and for no other purpose.

FRANK B. GARY,
Defendant's Attorney.

November 26th, 1900.

The defendant placed the case upon the docket of the court and the motion was heard before Judge Benet at the February term 1901, of the court of common pleas for Abbeville county.

The defendant offered the following affidavit in support of the motion, viz:

(Title of Cause.)

Now comes The Western Electrical Supply Company defendant herein and states that George F. Schminke the person upon whom service of summons was had herein, at the time of said service was not an officer of this defendant nor a director thereof; that he was simply and solely the traveling salesman for this defendant; that his duties & powers with this defendant were simply & solely to take orders for the sale of merchandise subject to the approval of this defendant in such States as he might be directed by this defendant from time to time. That he had no other powers or duties than these. That he was a resident of the city of New Orleans, State of Louisiana. That this defendant has no office or place of
25 business in the State of South Carolina. That said George F. Schminke was especially sent to the town of Abbeville at the time of said service to examine into the running of the machinery in controversy and report the facts to defendant, and that he was so

sent at the request of plaintiff. That the contract between plaintiff and defendant out of which the alleged cause of action arose if plaintiff has any cause of action, was not made in the State of South Carolina.

WESTERN ELECTRICAL SUPPLY CO.,
Per R. V. SCUDDER, *Gen'l Magnr.*

STATE OF MISSOURI, }
City of St. Louis. }

R. V. Scudder, being duly sworn, on his oath states that he is and was at the time hereinbefore mentioned general manager of The Western Electrical Supply Co. defendant herein, and that the state-m-nt- contained in the foregoing are true.

R. V. SCUDDER.

Subscribed and sworn to before me this 27th day of November 1900 in the city of St. Louis, Mo.

J. B. CARROLL,
[OFFICIAL SEAL.] *Notary Public.*

The plaintiff offered the following affidavit and card and letters in rebuttal viz:

(Title of Cause.)

Personally appeared before me W. N. Thompson, who being duly sworn says: That he is the president of the above named plaintiff. That the letters hereto attached were received from the defendant in due course of mail, and letters, copies of which are hereto at-
26 tached sent defendant. That the card hereto attached was handed deponent by Mr. George F. Schminke when he came to Abbeville representing the defendant in negotiations looking to the settlement of the differences between the plaintiff and the defendant, which resulted in the suit now pending in this court.

W. N. THOMPSON.

Sworn to and subscribed before me this February 21st, 1901.

J. L. PERRIN, *C. C. C. P.*

The following is the card referred to in the above affidavit:

George F. Schminke, Western Electrical Supply Company, electrical supplies, St. Louis.

The following are the letters and copies of letters in their regular order referred to and attached to the affidavit of W. N. Thompson, viz:

ST. LOUIS, *October* 23*rd*, 1900.

Abbeville Electric Light and Power Co., Abbeville, S. C.

GENTLEMEN: Referring to your favor of October 6th which has been held for the writer's return to the city, we notice fully what you have to say, and as ther- is such a marked difference between your report and the factory's report, and as we are put in the position of middle man as sort of a bumper between you and factory, you can readily appreciate our position, and we will defer writing you at any great length, excepting to say that if your position is correct you shall certainly be treated right. We have written our Mr. George F. Schminke who will be in Abbeville now in
27 about ten days and we will get a full report from him, and we have also written the factory fully regarding the matter and enclosed them a copy of your letter and we are satisfied that it will be news to them and we will advise you as soon as we hear from them and we have requested them to write us by return mail fully regarding the matter and we assure you that if your position is correct in this matter and the machine is defective that we will replace it with a machine that will perform in accordance with the contract. We trust you will bear with us until we can get a full and definite report from the factory and a reply to our lett-r to them today enclosing a copy of your letter under answer.

(Signed by defendant.)

The following is the letter of plaintiff in reply to the above:

ABBEVILLE, S. C., *October* 27*th*, 1900.

GENTLEMEN: In reply to your favor of the 23rd inst. we note what you say and would say that we are taking steps to buy a new machine at once for we cannot afford to be delayed any longer in this matter. Now in consideration of what you say in your last about sending your Mr. Schminke to Abbeville by the 3rd proximo we will defer buying the machine above referred to until the 5th proximo, provided you write us at once that your authorized representative will be in Abbeville by the above date with power to act so that we may be assured of a speedy settlement.

(Signed by the plaintiff.)

The following letter in reply to letter of plaintiff follows:

28 ST. LOUIS, *October* 29*th*, 1900.

Abbeville El. Lt. and Power Co., Abbeville, S. C.

GENTLEMEN: Your favor of the 27th inst. to hand and this is simply to acknowledge receipt of your letter and to let you know that we are following the matter up. Before answering your letter we are waiting to have a reply to a telegram we have sent to our Mr. George F. Schminke today asking him to wire us when he would

arrive in Abbeville, and also asking him to advise us by wire where a let-er would reach him, as we want to write him fully regarding the situation at Abbeville, and upon receipt of his reply advising us when he will be able to reach Abbeville we will answer your letter fully. We have no doubt, however, that he will be able to get into Abbeville not later than November 5th, and we think it will be very foolish of you to replace the Warren machine with a machine of another make if you intend trying to operate the other machine under the same conditions as the Warren, and we are very sure that if you will improve the conditions under which you are trying to operate this Warren machine and have your Warren machine fixed up that you will have no trouble with it. We are very sure that under the conditions you are trying to operate you cannot get any machine to give satisfaction, and we doubt if any machine would have stood the racket as long as the Warren machine has. Mr. Schminke is a very competent man and capable of passing on a thing of this kind and can advise you in a very few moments whether or not the conditions under which you are operating are unfavorable, and we trust that you will defer action on this matter until you give us an opportunity to look over the ground for ourselves which we will do when our Mr. Schminke arrives in Abbeville. We
29 will defer writing further until hearing from Mr. Schminke and will notify you as soon as we have his telegram.

(Signed by defendant.)

The next letter is dated St. Louis October 30, 1900 addressed to plaintiff and is as follows:—

GENTLEMEN: Referring to your favor of October 4th in which you enclosed your bill of October 1st against us amounting to $32.60 we return you herewith the invoice and will thank you to kindly hold this with the balance of the papers until final adjustment is made on the account in accordance with the agreement and when final adjustment is made of the account if you are entitled to credit for these items you shall certainly receive them, but we would prefer not dividing the thing up and making an entry now and another entry at the final adjustment, but will simply make one bite of the cherry. Please attach this letter and your bill to the other papers pertaining to this -ettlement and keep all of the papers together so that we can have them at the proper time. This letter was in a basket on the writer's desk during his absence in th- East, and in cleaning up the basket to day he found the letter and he thinks this will be the best way to dispose of the matter temporarily. We have not yet received a telegram from our Mr. Schminke in reply to ours of yesterday asking him when he would reach Abbeville, but we have received a lette- from him which indicates that he -ill be in Asheville N. C. tomorrow, at which time we expect to receive *a* an answer to our telegram and we will *them* notify you just when
30 you can expect Mr. Schminke in Abbeville.

(Signed by the defendant.)

Post script.—We are sending Mr. Schminke some letters in your care which we will thank you to kindly deliver to him when he reaches Abbevil'e.

The next letter is dated St. Louis November 1, 1900 address- to the plaintiff and is as follow-:

GENTLEMEN: Our Mr. G. F. Schminke will be in Abbeville on the 5th inst., and we are writing him fully today regarding the situation there.

(Signed by defendant.)

After argument of counsel for and against the motion his honor Judge Benet signed the following order:

(Title of Cause.)

This case came before me on a motion to set aside the service of summons. The defendant is a corporation under the laws of the State of Missouri, and entered a special appearance through its attorney for the purpose of setting aside the service of summons and of objecting to the jurisdiction of this court. Affidavits were presented by both plaintiffs and defendants as to the capacity in which Geo. F. Schminke, the person, on whom the service was made, was acting.

After argument of counsel on both sides I hold that defendant non-resident corporation could not be brought within the jurisdiction of this court by service of the summons upon the said George F. Schminke, he not being in my opinion an agent in the sense in which "any agent" is used in the Code.

It is therefore on motion of Frank B. Gary, defendant's
31 attorney, ordered, that the service of the said summons upon the said defendant, in the manner above related, be and the same is set aside. It is further ordered that the case be dismissed on the ground that this court has not acquired jurisdiction of the person or property of the defendant.

W. C. BENET,
February 21st 1901 *Presiding Judge.*

Within ten days after the rising of the court the plaintiff duly served notice of its intention to appeal and within thirty days served case and exceptions.

The exceptions are as follows:

1. Because his honor erred in holding that George F. Schminke was not an agent in the sense in which 'any agent' is used in the Code.

2. Because his honor erred in limiting the scope of the words any agent' as used in sub-division 1 of section 155 of the Code of Civil Procedure as amended by the act of 1899 page 42.

3. Because the Code in describing how service shall be made upon

a foreign corporation, having named the president, cashier, treasurer, attorney or secretary and then saying 'or any agent thereof' plainly meant to include ev-ry class of agents and it was error in his honor to hold otherwise.

4. Because it plainly appears from the affidavit of the defendant and from letters written by them that George F. Schminke was the direct representative of the defendant in the very matter out of which the suit arose, and it was error in his honor to hold that he was not an agent in the sense in which the words 'any agent' is used in the Code.

5. Because his honor erred in setting aside the service of
32 the summons herein, the same having been duly and legally made upon an agent of the defendant within this State.

6. Because his honor erred in ordering that the case be dismissed no notice of any such motion having been given the only notice being that a motion would be made to set aside the service of the summons.

7. Because his honor erred in holding that the defendant could not be brought within the jurisdiction of the circuit court by the service of the summons upon George F. Schminke he being as shown by defendant's own affidavit an agent of the defendant.

March 7th 1901.

W. N. GRAYDON,
Appellant's Attorney."

That appeal was heard by this court and its judgment rendered and filed August 5th 1901 "that the order of the circuit judge setting aside the service of summons in this case and dismissing the case for want of jurisdiction be reversed and that the case be remanded to the circuit court for Abbeville county for such further proceedings as may be necessary with leave to the defendant to serve its answer within twenty days after written notice to the counsel who represented the defendant at the hearing of the motion to set aside the service of summons of the filing of the *remittitur* in this case in the circuit court for Abbeville county." The opinion of the court was delivered by Mr. Chief Justice McIver 61 S. C. 361. It is *inter alia* decided that the letters of the defendant used at the
hearing of the motion below fully show that Schminke when
33 served with the summons in this State, was here as the representative of the defendant in the very transaction out of which the controversy arose. That the service upon him in any view that may be taken of the case was good and valid service upon defendant and would be held so to be by the Supreme Court of the United States under their decisions even apart from the South Carolina Code of Procedure.

Within the time within which the supreme court permitted the defendant to answer the complaint the defendant served upon the plaintiff's attorney the following notice of special appearance anthe following affidavit:

(Title of Cause.)

To Wm. N. Graydon, Esq., plaintiff's attorney:

Please take notice, that the defendant herein declines to answer the complaint herein in accordance with the allowance of the supreme court as it is advised that by answering it would submit itself to the jurisdiction of this court. Nevertheless the defendant enters a special app-arence for the purpose of objecting to the jurisdiction of this court with the ultimate view of appealing to the Supreme Court of the United States from the final judgment in the case should the same be adverse to the defendant.

Upon the call of the case the defendant will object to the judgment on the ground that the summons has not been served upon the defendant in this State, and this court has not therefore acquired jurisdiction of the person or property of the defendant.

The defendant will move the court to set aside the at-
34 tempted *attempted* service of the summons on the defendant on the ground that sud-division 1 of section 155 of the Code providing for the service upon a foreign corporation and the act of the General Assembly of South Carolina amending the said section of the Code by striking out the word 'resident' approved 2nd March 1899 are in contravention of the fifth and fourteenth amendments to the Constitution of the United States, and on the further ground that the act of the General Assembly of South Carolina entitled 'An act to further prescribe the terms and conditions upon which foreign corporations may do business within the State.' approved the 2nd day of March A. D. 1897 is in contravention of the fifth and fourteenth amendments to the Constitution of the United States.

The affidavits upon which this motion will be made will be duly served upon you hereafter.

The defendant will appear for the foregoing purposes and for no other.

FRANK B. GARY,
Defendant's Attorney.

September 10, 1900

In due time the following notice and affidavits were served upon the plaintiff's attorney.

(Title of the Cause.)

To Wm. N. Graydon, Esq., plaintiff's attorney:

Please take notice, that the motion of which you were heretofore given notice will be made upon the accompanying affidavits and the papers in the case.

FRANK B. GARY,
Defendant's Attorney.

September 16, 1900

35 (*Affidavit.*)

(Title of the Cause.)

Now comes The Western Electrical Supply Co. defendant herein, and states that it is not, and never has been engaged in business *if* the State of South Carolina, and that it has not now nor has it ever had an office or place of business in said State. That the contract between plaintiff and defendant, which is pleaded in the plaintiff's petition was not made in the State of South Carolina. That said contract by its terms, was to be performed by defendant in the town of Sandusky State of Ohio and that said contract was actually and fully performed by defendant in said town of Sandusky, State of Ohio, by delivering certain merchandise in said town and State of Ohio to the *the* plaintiff. That George F. Schminke the person upon whom service of summons was had herein was not at the time of said service and never has been an officer of this defendant nor a director thereof, but had been employed by defendant for a short time as a traveling salesman. That his duties and power were simply and solely to take orders for the sale of merchandise subject to the approval of this defendant. That he was not employed to make adjustments and was not sent by defendants in this particular case to make any adjustment or settlement of the controversy between plaintiff and defendant but while on his route as a salesman was requested by defendant to go to Abbeville and examine into the running of the machinery in controversy and the complaints of the plaintiff and report the facts to this defendant, and that while
36 said plaintiff was in said town of Abbeville for that purpose service of summons herein was had on him. Defendant further states that it has a just and meritorious defense to this action.

WESTERN ELECTRICAL SUPPLY CO.
H. K. GILLMAN, *Treasurer.*

STATE OF MISSOURI, }
City of St. Louis. }

H. K. Gillman and R. V. Scudder being severally duly sworn on their oaths state that they are and were at the times hereinbefore mentioned, respectively president and manager of The Western Electrical Supply Company defendant herein, and that the statements contained in the foregoing are true.

H. K. GILLMAN.
R. V. SCUDDER.

Subscribed and sworn to before me this 9th day of September 1901.

GEORGE E. TAYLOR,
Notary Public.

(My commission expires December 28th, 1903.)

[SEAL.]

Upon the call of the case for trial the defendant through its attorney Frank B. Gary objected to the jurisdiction of the court in pursuance of the note above set forth and presented the affidavits above set forth in support of the -bjection, and set forth its objections in writing as follows:

(Title of the Cause.)

The defendant having entered a special appearence interposes a demurrer to the jurisdiction of this court on the ground that the defendant has *no* not been brought within the jurisdiction of the court by service of summons upon it in this State, and on the ground
37 that subdivisions 1. of section 155 of the Code of Procedure of S. C. providing for service upon a foreign corporation and the act of the General Assembly of South Carolina amending the said section of the Code by striking out the word 'resident' approved 2nd March 1899 are in contravention of the fifth -nd fourteenty amendments to the Constitution of the United States and on the further ground that the act of the General As-embly of South Carolina entitled "An act to further prescribe the terms and conditions upon which foreign corporations may do business within the State," approved 2nd day of March A. D. 1897 is in contravention of the fifth and fourteenth amendments to the Constitution of the United States.

FRANK B. GARY,
Defendant's Attorney.

Oct. 17th, 1901.–(Certificate.)

The presiding judge D. A. Townsend overruled the objection to the jurisdiction of the court and made the following order:—

(Title of the Cau-e.)

The defendant Western Supply Company through its attorney Frank B. Gary entered a special appearence for the purpose of objecting to the judgment in this case and demurs to the jurisdiction of this court on the ground that the said defendant is a foreign corporation has not been served with the summons in this State and has not been brought in the jurisdiction of this court and on the ground that subdivision 1 of section 155 of the Code of Civil Procedure of South Carolina, providing for service upon a foreign corporation and the act of the General Assembly of the State of South Carolina. amending the said section of the Code by striking
38 ou- the word 'resident' approved the 2nd of March 1899 are in contravention of the fifth and fourteenth amendments to the Constitution of the United States and on the further ground that the act of the General Assembly of the State of South Carolina entitled An act to further prescribe the terms and conditions upon which foreign corporations may do business within this State.' ap-

proved the 2nd day of March A. D. 1897 is in contravention of the fifth and fourteenth amendments to the Constitution of the United States.

The defendants offered affidavits which are herewith filed I am constrained to adopt the construction *palced* upin said statutes by the supreme court of the State and I hold that the acts and section of the Code referred to in the demurrer are not in contravention of the fifth and fourteenth amendments to the Constitution of the United States.

I hold further that this court has acquired jurisdiction of the person of the defendant.

The demurrer to the jurisdiction of this court and the objection to this court rendering judgment are overruled.

D. A. TOWNSEND,
Presiding Judge.

October 7th, 1901.

39 The defendant thereafter had no further connection with the case.

The plaintiff then offered evidence tending to support the allegations of the complaint and the jury rendered a verdict for the plaintiff in the sum of $1,995.00 and judgment was duly entered up upon said verdict in accordance with law.

In due time the defendant gave notice of intention to appeal to the supreme court of the State from the order rulings of his honor, verdict of the jury and judgment entered thereon, and in the time prescribed by law served this case and the following exceptions:

1. Because his honor, the presiding judge erred in holding that the court of common pleas for Abbeville county had acquired jurisdiction of the person of the defendant, when it appeared that the defendant is a foreign corporation, had not come within the limits of South Carolina to do business, that the contract for the sale of the machinery was not made in South Carolina, by its terms was to be performed in Ohio, and that the only service of process made was upon a person in the State in no representative capacity, with no authority to bind the defendant in any way and only connected with the defendant as a travelling salesman to take orders for the sale of machinery subject to the approval of the defendant.

2. Because his honor the presiding judge erred in not holding that it was beyond the power of the State to enact a law that would authorize service of process upon any agent of a foreign corporation and thus b-ing such foreign corporation within the jurisdic-
40 tion of the courts of this State such a law being in contravention of the fifth and fourteenth amendments to the Constitution of the United States, wherein it is provided that " No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life or liberty or property without due process of law.'

3. Because his honor erred in holding that sub-division 1 of sec-

tion 155 of the Code of Procedure of South Carolina as amended by the act of the General Assembly of South Carolina approved the 2nd March 1899 is not in contravention of the fifth and fourteenth amendments to the Constitution of the United States, in which amendments it is provided that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law.'

4. Because his honor the presiding judge erred in holding that the act of the General Assembly of South Carolina, entitled 'An act to further prescribe the terms and conditions upon which foreign corporations may do business in this State,' approved the 2nd March 1897 is not in contravention of the fifth and fourteenth amendme-ts to the Constitution of the United States. It is respectfully submitted that the said act and especially section 4 thereof, providing that 'it shall be a further condition precedent to the right of any such corporation to do business in this State that it shall be taken and deemed to be the fact irrebuttable, and part and parcel of
41 all contracts entered into between such corporation an- a citizen or corporation of this State, that the taking or receiving from any citizen or corporation of this State of any charge fee, payment toll impost, premium or other money or valuable consideration, under or in performance of any such contract, or of any condition of the same, shall constitute the doing of its corporate business within this State, and that the place of the making and of performance of such contract shall be deemed and held to be within this State anything contained in such contract or any rules or by-laws of such corporation to the contrary notwithstanding,' abridges the privileges or immunities of citizens of the United States and deprives the citizens of their property without due process of law, and denies the equal protection of the law.

5. Because his honor the presiding judge erred in not holding that the defendant had not come within the limits of the State of South Carolina and that the summons in this case had not been served upon it in this State.

6. Because the presiding judge erred in not setting aside the service of summons and in not dismissing the complaint; and erred in allowing verdict to be rendered and the judgment entered in this case.

FRANK B. GARY,
Defendant's Attorney."

Written notice was given April 30, 1902 to defenda-t's attor-
42 ney, that plaintiff's attorney would, on the *the* printed record in this case and the record on file in this court upon the former appeal, move this court to dismiss this appeal on the ground that the rulings sought to be appealed from was *res judicata*, and had already been passed upon by this court in the former appeal.

This motion of plaintiff was heard along with this appeal of defendant.

From this statement it would seem, that the dec-sion of this court 61 S. C., 361 was, if not the law of the land, at least the law of this case on the question of the validity or invalidity of the service of the summons. It decided that the service of the summons was good and valid service by which defendant was b-ought within the jurisdiction of the circuit court. It gave defendant twenty days after service of the notice of the filing of the *remittitur* within which to serve answer, the full time allowed by the Code after service of summons and complaint. Defendant declined to answer, but objected to, and interposed a demurrer to the jurisdiction of the court on the grounds that defendant had not been brought within its jurisdiction by the service of the summons made, and that certain South Carolina statutory provisions named were in contravention of the 5th and 14th amendments to the Constitution of the United States, we are of opinion that when an objection to the jurisdiction based on the alleged illegal service of a summons has been made and overruled, no second objection based thereon can be admitted, however variant may be the specifications of the objec-
43 tions taken the first and second time from each other the same rule applicable to dilatory pleas, being applicable to such objections, at least in this regard "After any dilatory plea has been overruled, no second plea of the *same kind or class* can be admitted" Gould on Pleading page 227 "There must be an end of litigation somewhere and parties cannot be permitted *to try their cases by peice-meal*" Bleckeley *v.* Branyan 28 S. C. 450

A fortiori they cannot be permitted to try the disputed validity of the service of a summons by piece-meal.

The decisions of this court *was* conclusive not only of all objections based on the alleged illegality of service which were made but also of all objections based thereon which could have been made. Exe'rs of Tate *v.* Hunter 35 Strob. 139 McDowall *v.* McDowall Bail Eq. 330 Stoney *v.* Bank 1. Rich Eq. 276. Hibler *v.* Hancock 2 Strob. 107. 7 Rob. Pr. 13 Maxwell *v.* Connor 1 Hill Ch. 22.

"A demurrer on the ground that complaint does not state facts sufficient to constitute a cause of action when once taken and lost on certain specifications, showing wherein the complaint is defective cannot be renewed at any subsequent trial on the same or other specifications. This ground of demurrer is single and all specifications thereunder not made when heard are deemed *waived*." Turner *v.* Association 51 S. C. 36. We are therefore of opinion that the circuit judge was correct in holding in accordance with the previous decision of this court, that the circuit court had acquired jurisdiction of the defendant, and in overruling the demurrer to
44 the jurisdiction of the court, and the objection to the court's rendering judgment and that the judgment below must be affirmed It might be plausibly contended that a decision holding service of a summons to be good and valid involves in it the idea

that the same has been made by due process of law; but as we do not regard it necessary to the determination of the case to pass upon the constitutionality of the acts alleged to be in contravention of the Federal Constitution, the record presenting the other and clear ground above, on which this court rests its judgment, we decline to indicate any opinion as to the constitutional questions, resting our affirmance of the judgment below solely upon the grounds herein above stated. Cooley Con. Lim. 2 ed. 163 *Ex parte* Florence Schools 43 S. C. 15 Butler *v.* Ellerbe 44 S. C. 266

The judgment of this court is that the judgment entered in the circuit court upon the verdict for the plaintiff be affirmed.

I concur in the result only as I think the Federal question that appears in the record is satisfactorily disposed of, by the former opinion in this case.

EUGENE B. GARY, *A. J.*

Attest:

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

45 [Endorsed:] The State of So. Ca. In the supreme court April term 1902 Abbeville Electric Light & Power Co. pl'ff, resp'd't, against Western Electrical Supply Co. def't, app'l't. Opinion. Le Roy F. Youmans, acting associate justice. We concur: Y. J. Pope A. J., Ira B. Jones A. J. I concur in the result. See within Eugene B. Gary A. J Filed 11th July, 1902.

Endorsed on cover: File No. 19,209. South Carolina supreme court. Term No. 178. Western Electrical Supply Company, plaintiff in error, *vs.* Abbeville Electric Light and Power Company. Filed January 20th, 1904. File No. 19,209.